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BY MESSENGER

The Honorable Kathleen A. Sheehy
Administrative Law Judge
Office of Administrative Hearings
100 Washington Square, Suite 1700
Minneapolis, MN 55401

Re: EQB Staff Suggested Changes (10-11-02) to Proposed Amendments to Power Plant Siting Rules: Minnesota Rules Chapter 4400
OAH Docket No. 58-2901-15002-1

Dear Judge Sheehy:

We have had an opportunity to review the EQB's 10-11-02 suggested changes to the Chapter 4400 rule language it had previously proposed. We are pleased with the amended language for proposed Rule 4400.1350: Notice of Project (pp. 1-7), as well as the EQB's "Draft Public Notice" (pp. 8-9). We wish to thank the EQB for responding to the notice concerns that were raised by various participants in this docket.

However, there is one significant notice problem remaining in proposed Rule 4400.5000: Local Review of Proposed Facilities (pp. 17-20). We had overlooked this problem in our earlier comment, because the original 4400.5000 language was silent on public and landowner notification, leading us to believe that the notice provisions contained in Minn. Stat. § 116C.57, subp. 2b (and specifically referenced in Minn. Stat. § 116C.575, subp. 4) would apply here as well.

In Minn. Stat. § 116C.575 ("*alternative* review of applications") and Minn. Stat. § 116C.576 ("*local* review of applications"), the Legislature allowed various "applicable projects" to qualify for a somewhat different standard of siting/routing review than what is required by Minn. Stat. § 116C.57. The definitions of "applicable projects" for such alternative review is set forth in Subdivision 2 of each of § 116C.575 and § 116C.576. Five of the seven types of "applicable projects" that qualify for alternative review are exact matches in each of these statutes:

- large electric power generating plants with a capacity of less than 80 megawatts
- large electric power generating plants that are fueled by natural gas
- high voltage transmission lines of between 100 and 200 kilovolts
- a high voltage transmission line service extension to a single customer between 200 and 300 kilovolts and less than ten miles in length
- a high voltage transmission line rerouting to serve the demand of a single customer when the rerouted line will be located at least 80 percent on property owned or controlled by the customer or the owner of the transmission line

The Legislature specifically required that notice of an application under § 116C.575 (*alternative* review of applications) be the same as § 116C.57, subd. 2b (now set forth in detail in EQB's 10-11-02 amendments for Rule 4400.1350: Notice of Project). However, under § 116C.576 (*local* review of applications), the Legislature merely provided that the applicant notify the board that it had applied for local siting/routing review, and was silent on public notice requirements.

The EQB's 10-11-02 amendments to Rule 4400.5000 insert a requirement for mailed notice to "persons on the general notification list" (p. 17), but neglect to include any requirements for public or landowner notification. In its explanation concerning new amendments to this Rule, the EQB states (pp. 18-19):

> "The language being suggested does not require the applicant to include in the notice all the information that is required under part 4400.1350, subp. 3 … nor all the information required to be included in the notice. Because the project is being reviewed locally, it is appropriate to rely on the local governmental body to determine what kind of notice is appropriate within the community. In addition, a lot of the information required under the EQB rule is pertinent to the EQB and may not apply to local review. For example, references to the EQB rules and to the EQB public advisor do not apply in such situations."

The EQB's position on notice under local siting/routing authority is unjustifiable. Part of the EQB's explanation concerning this Rule is that there are "people who want to know about proposed large power plants and high voltage transmission lines, regardless of …. whether the applicant has sought a permit from the EQB or the local unit of government" (p. 18) and that "a broader dissemination of notice is required." (p. 18) But despite this acknowledgment, the EQB added notice only to persons on its general notification list! We maintain that regardless of the governmental unit from which an applicant seeks a site or route permit to construct large energy facilities on private land, the citizens who may be affected by the application are certainly "people who want to know." Further, potentially affected landowners are entitled by Constitutional right to direct mailed notice. (That's why the Legislature included landowner notification requirements in its 2001 energy laws in the first place.)

The Legislature's intent to provide direct mailed notice of a proposed project to "each owner whose property is on or adjacent to any of the proposed sites for the power plant or along any of the proposed routes for the transmission line" (§ 116C.57, subd. 2b) is a clear mandate, and may not be circumvented by an applicant selecting *local* governmental review instead of *state agency* review. Although the Legislature did not specifically include the 116C.57 notice requirements in Minn. Stat. § 116C.576 (local review of applications), it did reference the notice requirement in Minn. Stat. § 116C.575 (alternative review of applications), and these two statutes have almost identical definitions for the types of projects that may seek alternative or local review. The Legislature certainly did not *exempt* landowner notification requirements from projects under local review. Further, the EQB's explanation of the 10-11-02 changes to part 4400.5000 says that for projects qualifying for local review, "the law requires that a similar process to the one followed by the EQB, including environmental review, be followed by the local unit of government." (p. 18) This statement is equally true with respect to landowner notification.

The EQB explains that the language suggested for 4400.5000 does not contain the 4400.1350, subp. 3 notice requirements because "a lot of the information required under the EQB rule is pertinent to the EQB and may not apply to local review." (p. 19) This statement is totally incorrect. The EQB's 10-11-02 proposed language for "content of notice" (4400.1350, subp. 3) need only be slightly altered to apply to local review. We have set forth the necessary language revisions below (in brackets):

"Content of Notice:

A. A description of the proposed project, including a map showing the general area of the proposed site or proposed route and each alternative.

B. A statement that a permit application has been submitted to the **[name(s) of local government unit(s)]** and the name of the permit applicant and information regarding how a copy of the application may be obtained.

C. A statement that the permit application will be considered by the **[responsible government unit(s)]** under the provisions of **[applicable laws and rules]** and describing the time periods for the **[responsible government unit(s)]** to act.

D. A statement that the **[responsible government unit]** will hold a public meeting **[appropriate time period]** and the date of the meeting if it is known at the time of the mailing.

E. The manner in which the **[responsible government unit]** will conduct environmental review of the proposed project, including the holding of a scoping meeting **[if applicable]** at which additional alternatives to the project may be proposed.

F. The name of the **[responsible government unit]** staff member who has been appointed by the **[responsible government unit]** to serve as a public advisor, if known, or otherwise, a general contact at the **[responsible government unit]**.

G. The manner in which a person may register his or her name with the **[responsible government unit]** to be included on the project contact list.

H. A statement that a public hearing will be conducted **[if applicable]** after the **[appropriate environmental review document]** is prepared.

I. A statement indicating whether a certificate of need or other authorization from the Minnesota Public Utilities Commission is required for the project and the status of the matter if such authorization is required.

J. A statement indicating whether the applicant may exercise the power of eminent domain to acquire the land necessary for the project and the basis for such authority.

K. Any other information requested by the **[responsible government unit]** to be included in the notice."

The EQB's 10-11-02 Draft Notice of Application (pp. 8-9) can be similarly altered to accommodate local government review.

Local review of applications for power plants and high voltage transmission lines may actually involve numerous governmental jurisdictions. These project reviewers must have specific guidelines from the State concerning their legal responsibilities and duties. By including clear notice requirements in these Rules, the State will avoid uncertainty for applicants, local governmental units, and affected citizens. In addition, clear notice requirements will prevent an applicant utility from attempting to manipulate a local unit of government into failing to provide direct notice to potentially affected landowners. The Legislature aimed the notice requirements contained in these statutes and rules at <u>applicants</u> for large energy facilities rather than governmental units who may end up reviewing a proposal; thus, the <u>applicants</u> cannot be relieved of the duty to notify by simply approaching a different governmental unit for review of a project proposal.

Under the structure of the EQB's proposed Rules, a project proposer may endeavor to *avoid* landowner notification by choosing to proceed under § 116C.57<u>6</u> rather than § 116C.57<u>5</u> for the types of projects described (with identical language) in both statutes. Such a result would unfairly prejudice landowners on projects reviewed by local units of government. Clearly, such a result is irrational and was not intended by the Legislature, as explained by Minn. Stat. § 645.17, "Presumptions in ascertaining legislative intent":

> "In ascertaining the intention of the legislature the courts may be guided by the following presumptions:
>
> (1) the legislature does not intend a result that is absurd, impossible of execution, or unreasonable;
>
> (2) the legislature intends the entire statute to be effective and certain;
>
> (3) the legislature does not intend to violate the constitution of the United States or of this state;

> (4) when a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language; and
>
> (5) the legislature intends to favor the public interest as against any private interest."

The Legislature unmistakably intended that potentially affected landowners would receive direct mailed notification when it redrafted Minnesota's energy laws in 2001. Furthermore, potentially affected citizens enjoy the Constitutional right to direct notice, so there can be no exemption from this requirement merely based upon who is named as the responsible governmental unit for siting/routing of large energy facilities. As the EQB states in its Rule 4400.5000 explanation, "people … want to know about proposed large power plants and high voltage transmission lines, regardless of … whether the applicant has sought a permit from the EQB or the local unit of government" (p. 18) and that "a broader dissemination of notice is required" under Minn. Stat. § 116C.576. (p. 18)

Proposed Rule 4400.5000 **must** be amended to include the same notice requirements as set forth in the new proposed Rule 4400.1350, with minor language revisions as outlined above. In this way, the Legislature's explicit intent to provide adequate notice to potentially affected citizens will be satisfied.

Thank you for your consideration.

Respectfully submitted,

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John C. Reinhardt

cc: Alan Mitchell *(by messenger)*
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